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What Might Macneil Have Said about Using eBay?

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What might MacNeil have said about using eBay?

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WHAT MIGHT MACNEIL HAVE SAID ABOUT USING EBAY?

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In this chapter I want to look at computer-mediated consumer purchase contracts. These are contracts made in the world of e-commerce using websites such as Amazon which exist only as electronic presences and the online presences of conventional “bricks and mortar” retail establishments. In 2011 the value of retail online sales in the UK was £50.34 billion representing 12.0% of UK retail trade. In 2008 the equivalent figure was 8.6% of retail sales. In the US the market share of online sales is 9.0% (CCR 2011). In Australia and New Zealand the figure is rather lower at just under 7% but is predicated, like the UK, the US and Europe to carry on growing (Frost and Sullivan 2012). The growth of online shopping, previously fuelled by the increase in domestic broadband accessibility, now unsurprisingly mirrors the popularity in ownership of mobile devices that can access the internet; in the UK just over a quarter of adults own a smartphone, in the US that figure rises to over a third (Ofcom 2011; Pew Research Centre 2011). Continuing online retail sales growth in a period of general contraction for retail sales because of world wide economic conditions emphasizes the entrenchment of online shopping as a cultural practice. The particular example for this paper comes from a study of contracts made using eBay, which is a marketplace site that acts as an intermediary rather than as a retailer in its own right. As the paper points out contracts made using this marketplace differ from

contracts made using online presences of conventional retail establishments or internet sites such as Amazon in that trust has to be established not in a brand name for goods or in a retail establishment but in an unknown individual.

A discrete contract is a contract made without social relations Macneil tells us, and yet he also suggests that all contracts are relational in they are embedded in some social relations, however minimal. Even the most discrete contract on Macneil's terms is encircled by an understanding about how an exchange will be facilitated (Macneil

1986:577; 1987a: 32) a concept which he understandably draws very widely (Macneil 1974a:724) expanding outwards from his four core elements; order, means of enforcement, means of exchange and communication (Macneil 1999-2000:834). We might deduce from this that the discrete contract is something that is impossible to achieve and that all contracts are relational with some just being less relational than others. However I would assert that Macneil in much of his work is using terminology that does not belong to the language family that is recognized by lawyers and this results in readings of his position that are not in strict accordance with what he meant. Later in this chapter I try to unpick Macneil's apparently contradictory comments on the relational-discrete distinction. This discussion is important for the accommodation of these computer-mediated contracts within Macneil's framework.

Computer-mediated contracts offer a very different form of social relations from those observed by Macneil, even if all due recognition is given to his observation that contract is a field of huge breadth when he opines that the contractual relations of IBM and a McDonald's hamburger franchise are very different (Macneil 1980:20). In order to place these contracts within a Macneilian framework it necessary to see

his work, particularly at the micro level of his contract norms, as being rooted very much in a particular understanding of industrial society and reason forwards from that point. Macneil uses contract in a macro sense to progress society from primitive to advanced and in doing so he anchors his micro level analysis of the behavioural dimension of contract to a reading of industrial society that is very orientated towards a particular understanding of production and employment relations (Macneil 1985). The effect of this is that behavior that Macneil might have characterized as discrete and as such on the edge of society now in fact represents behavior that is much closer to the centre ground of social relations. This is explored in the second section of the paper. In this way the chapter builds on Macneil's position in relation to the discrete norm (Macneil

1983:355f) and offers a contribution to the debate around whether a purely discrete contract is ever possible. My conclusion on this point is that Macneil fails to distinguish between the social processes involved with making a contract and the informational relationships that underpin strategic choices that are made in the contractual interaction. If these two are separated then a more nuanced and descriptive meaning can be given to the notion of "discrete" in the world of contract. I explore what this might look like in the third section of the paper.

The analysis that I offer in this chapter sits alongside the one offered by Brownsword in his chapter in that from a similar starting point we offer very different but complimentary ways forward in thinking about the future of Macneil's model of contract. The abstracting and dehumanizing effect of technology, or the actions of Technical Man that might result from technology, were a concern that Macneil voiced in the closing ten pages of *The New Social Contract* (Macneil 1980:108-118). This passage is examined in some detail in Brownsword's chapter in this collection and I do not intend to go over that ground again. He exposes Macneil's concerns as ones

about control and perfection. Technical Man can organize his world so that the “messy reality” to use contract practice (Macaulay et al 2010:30) as an example need not be part of it. Spontaneity can be designed out of interaction and replaced instead by entirely bureaucratic structures that recognize only demands “for presentation and discreteness” (Macneil 1980:110). Macneil’s alternative to the world of Technical Man is the life offered in the country he calls Post-Technique. It is to the citizens and legislators of Post-Technique that Brownsword’s largely regulatory solution in support of a New Social Contract is addressed. It focuses on the control of technology to support self-governance in the pursuit of flexibility and autonomy but to regulate it where asymmetries of power emerge. His analysis is a sophisticated one that considers prudential, moral and practical regulation.

I-A Technological World

Alongside his concerns about the disassociation of Technical Man from social relations we have to set Macneil’s observation also from within *The New Social Contract* about the effect of the existence of technology on contract practice and that is that its complexity ties “even the most specific and measured exchanges into on- going relational patterns” (Macneil 1980:22). The technological world of 2013 is far advanced from anything that Macneil could have thought possible in 1980 but the reality I suggest is that contracts such as these have become less not more relational as I explain below. The worked example that I use in this chapter to look at how technology has changed social relations within the contractual matrix is the purchase made using eBay; the transaction that can result in the most mundane of purchases but can also accommodate an impulse buy that stimulates excitement in the least

consumption focused individual. Whatever item I desire to buy – as long as it is not a living animal – the chances are that it will be available through a listing on eBay from a seller somewhere in the world and, if it is not currently listed it, it might be the next time I look or the time after that. In this way eBay becomes a game that can be played every day to quench the desire for consumption activity (Molesworth and Denegri-Knott 2008). I will not know exactly where in the world beyond the particular nation state my object is located and I will know nothing about the seller other than the other items they are offering for sale. I want to suggest that we see different configurations of power emerging in these transactions compared with conventional consumer shopping scenarios (Rha and Widdows 2002) and that power is maintained and advanced through artificially constructed devices such as feedback systems, the contents of which are entirely the product of social relations. These are the new communications systems that have replaced any “dickering over terms” or perhaps, more appropriately to a consumer contract scenario, any face to face inquiries about colour choices, delivery times and the possibility of seasonal sale discounts (Licklider and Taylor 1968)

Advances in technology in general and in the functionality of the internet in particular when it was opened to commercial applications in the early 1990s (Abbate 1999; Wu 2010:168-175,262-268) have had a transformative effect on human existence. Broadband technology and telecommunications innovation have resulted in the more precise articulation of, what I term, vertical relationships between individual *qua* citizen and state and between citizen and corporation. In general terms we can see that it has enhanced the democratic process, both formal and informal (Coursey and Norris 2008; Van Laer 2010) and improved the targeting and delivery of some public

services (UN 2008). It is a significant factor in increasing economic development (Czernich et al 2011), even though we can drill below these generalities into the persistence of the digital divide and the inequalities that are created and exacerbated by that (Eubanks 2011: 35-48). It is also the case that the internet has created the opportunity for some relationships which are potentially very unequal and require power imbalances to be addressed in form of human rights protection and other regulatory controls if these relationships are not to be abusive. Although Brownsword does not articulate these instances specifically in his account of necessary regulatory structures, he must have in mind the potential for the state to employ surveillance and monitoring technology in relation to individual's movements, the acquisition and retention of personal information by corporations through purchase histories and the use of social media and from that retention the unscrupulous targeting of unsolicited loans often with very high interests rates, age and content inappropriate viewing and gaming possibilities and consumer product marketing. Internet use renders the watching and monitoring of individuals inevitable and routine (Bennett 2008).

On a more personal level it has enabled us to live our dreams through using cyber handles and avatars to create literally a Second Life (Denegri-Knott and Molesworth 2010a), to set up entirely different identities for different purposes, to create communities of interest that are divorced from geographical proximity (Williams 2006), to construct our own work life balance through working remotely and to embrace creativity by moving away from the linearity of thought imposed by traditional structures. However just as with the relationships that I term vertical this transformative effect on the individual is not always positive. The employment opportunities it has created outside of design and invention work are the new satanic

mills of call centres and data entry nodes, acknowledged to offer low job satisfaction (Ellis and Taylor 2006), or the factories located in developing economies that piece together the actual machines that make the use of internet technology possible that have become as notorious as garment sweatshops for their use of child labour and their dangerous working conditions (Bradsher, Duhigg and Ouyang 2012). There is evidence that online communities are created at the expense of maintaining existing relationships that depend on telephone use and direct personal contact (Kraut et al 1998; Wellman, Boase and Chen 2002). Unsurprisingly the literature on technology captures these paradoxes and divides itself between laudation and damnation (Mick and Fournier 1998).

In horizontal relationships, specifically in the world of contract, technology has rendered the previously reasonably social practice of shopping (Bowlby 1997: 102-104) whether that is task fulfillment shopping or recreational shopping (Wagner and Rudolf 2010) a potentially more solitary exercise; access to credit and an internet connection means one is able to enter into a wide range of transactions without engaging in communication beyond the use of a point, click and buy interface. The sensory stimulation offered by the freedom of the physical space of shopping centres and browsing opportunities is replaced by surfing the virtual world of the web (Cox, Cox and Anderson 2005). The impulse to buy in both cases may come from similar sources such as advertising and window-shopping represented in the world of the internet by website design and interactive functions (sometimes referred to as the “stickiness” of a website (Miller 2000)) and ultimately by the aesthetic power of the screen (Zwick and Dholakia 2006) and the desire to buy with its concomitant feelings of escape and otherness is the same in both contexts but one involves human contact

and the other involves social relations mediated through virtual space (Belk, Ger, Askegaard 2003). The purchase made across virtual space is not necessarily more rational, reasoned or needs orientated than a purchase made in a conventional retail store simply because it can be concluded more quickly. However the internet offers the opportunity for the purchase to be more informed and selected from a wider range of possible purchases. Consumers can access a global market, gather information on price and quality variance and potentially connect with other consumers who have made or are considering a similar purchase from the same range of potential sellers. This reverses the power imbalance that conventionally is said to exist between buyer and seller in favour of the buyer (Pires, Stanton and Rita 2006). As section 3 of the paper explains buyers using the eBay platform draw on this power imbalance to make their purchases and enhance it through participating in the eBay feedback system.

What binds applications of technology together at the level of the individual is the idea of interactivity – filling in a self-assessment tax return and applying for a loan from a bank are interactive processes. They are about functionality, speed of communication and the relatedness of sequential messages (Rafaeli and Ariel 2007). As I explain below interactive processes look like relatively discrete social relations in Macneil's terms and involve no more by way of complex social relations (cf Walther 1992) than the potentially coercive vertical relationships outlined above. To discover social relations in internet transactions we have to dig beyond the level of mere interactivity (Downes and McMillan 2000) limited to a clicked decline or accept to discover a deeper information flow (Rezabakhsh et al 2006).

Most days when I return from work and certainly at the weekends I peruse eBay, in the compulsive fashion described by fiction writer and icon William Gibson

(Gibson 1999), for any new listings and price changes in the form of bids in the categories that I follow because I am an addicted collector, in a taxonomic sense as opposed to an aesthetic sense (Belk 1991), of diverse and obscure things that include, as I explain below, Beswick china Beatrix Potter character figures. I use eBay for purchasing everyday household items but the account of eBay trading in this paper is all about sourcing the “special” (to me) item;; hoping intently that the missing piece is there and at a price I can I afford, choosing the seller, bidding for rather than simply buying the item and then securing the item through submitting the bid that beats all competitors in the time period the proxy auction allows, all the while hoping that I do not then see a better example of the piece in question on another day. In this way eBay becomes something of an emotional drama which I play through nearly everyday (Denegri Knott and Molesworth 2010b). I am not alone in my daily visits to eBay; the calendar year to September 2012 saw 108.3 million active users bid for, list, buy or sell on eBay.ⁱ

The internet and eBay in particular has empowered me and thousands of taxonomic collectors like me to scour the world in pursuit of the objects that I desire. The fastest growing categories of items for sale on eBay have been listings for collectibles such as stamps and medals (Bradley and Porter 2000). The steps necessary to become a successful collector are truncated and rendered simpler by the internet auction sites like eBay. Planning what to collect (goal formation), hunting for the objects to collect and garnering a knowledge base about the objects themselves in terms of their scarcity and distinguishing marks is made much easier by the image rich internet (Ellis and Haywood 2006). Ebay listings contain descriptions and photographs of items. Old auction catalogues, magazines and collectors guides are

available in different eBay listings or from sites such as Amazon. Ebay hosts collection pages for those who want a quick overview of particular items. However all the exhilaration and excitement of the planning phase (Formanek 1991) as which object to be pursued is decided upon and then courted through bidding is still there. Actual ownership in the form of handling the object and placing it on the shelfspace allotted to it within the collection can be imagined as the clock ticks down to zero on the listing (Olmsted 1991; McCracken 1988:110f).

It is possible to become a connoisseur of a particular field, an expert in identifying the item that makes enhances a collection much more quickly and with less effort than would have been the case previously (McIntosh and Schmeichel 2004). The internet accommodates Belk's four types of collector; the passionate collector who collects obsessively as a matter of desire, the hobby collector, the investor collector and the "wannabe" collector who collects as a statement of status (Belk 1998) which are located within Belk's broader definition of a collector as someone who engages in the "the process of actively, selectively, and passionately acquiring and possessing things removed from ordinary use and perceived as part of a set of non-identical objects or experiences" (Belk 1995:479). All of these types share certain self-fulfilling or self-enhancing motivations, even if there is no over-arching psychological explanation for what makes people pursue collecting (Pearce 1992), that can be accommodated in more general paradigms of behavior around escape, entertainment and control (Case 2009). The significance of eBay in relation to collecting is that collecting behavior becomes about the individual and their introspection.

Despite eBay's hosting of collectors clubs, most of which have very small

memberships in comparison with the listings for the items they map onto, the process of internet collecting is a solitary activity. Buyers and sellers can find each other in a virtual market place without needing to meet in a physical space. There is no need to set up organizations to host collectors' fairs or swap sessions. The ICDA (Interactive Consumer Decision Aids) technology that eBay uses means that buyer and seller are separated in virtual space. The buyer can make bids and having set their highest price (not known to the seller or other potential buyers in the same virtual space) eBay will act through a proxy bidding system to place bids on their behalf up to that limit against bids entered by other buyers. There is no face-to-face interaction involved in the way that there is at car boot sales, auction houses or in the traditional shopping scenario and in the overwhelming majority of sales there is no email contact between buyer and seller until after the sale is concluded if at all (Resnick and Zeckhauser 2002). Even then contact is via an eBay user name and the parties do not know each other's legal identities. There is no role for pre-sale contact because eBay allows only very few variances in contract terms and buyer and seller reputation is created by the parties to previous contracts. Haggling behavior is not part of the process and the intensity of the purchase experience comes from acquisition not from "getting a bargain" or negotiating a deal.

II-Discrete and Relational Contracts

The e-Bay transaction described in outline above looks to be concluded with the very minimum of social relations. There is no communication between the actual parties over and above that mediated through the eBay software which also offers access to a similarly mediated payment system operated by its wholly owned company, PayPal,

and dispute resolution system if required. We might say that what is described resembles the discrete transaction that Macneil describes thus:-

Discrete contracts are characterized by short duration, limited personal interactions, and precise party measurements of easily measured objects of exchange. They require a minimum of future cooperation between the parties. No sharing of benefits or burdens occurs, nor is altruism expected. The parties are bound precisely and tightly. The parties view themselves as free of entangling strings (Macneil 1978:275)

From *The New Social Contract*:-

Everything about the discrete transaction is short-the agreement process, the time between agreement and performance, and the time of the performance itself. The discrete transaction commences sharply by clear, instantaneous agreement and terminates sharply by clear and instantaneous performance; sharp in, sharp out.

And later in the same text:-

Discreteness is the separating of a transaction from all else between the participants at the same time and before and after. Its ideal, never achieved in real life, occurs when there is nothing else between the parties, never has been, and never will be. (1980:11,60)

It is the possibility of isolating this type of contract scenario from its more sophisticated counterpart – the relational contract - that is taken to be the general proposition that can be derived from Macneil’s work (Feinman 2001:59f). The “gas station on the Jersey turnpike” that is visited by someone who rarely travels the road has become a well-known shorthand for the discrete scenario (Macneil 1978:857) as has the horse purchase between two strangers (Macneil 1974b:594). What is less well documented is the career long struggle that Macneil had to explain that this distinction alone was not what he meant by the discrete contract and so avoid being misinterpreted on this point. When Macneil used the gasoline purchase example in 1974, in the footnotes of the article he placed the contract made at the gas station in a web of social relations around brand and advertising and in a network of other

contracts concerning the provision of credit (1974a: 720-721). He does a similar thing in relation to supermarket purchases; the “this for that” so characteristic of depersonalized self-service shopping is not a discrete contract but instead one that is embedded in social relationships and a network of other contract transactions; the shopper and brand loyalty to product or retailer, credit transactions between shopper and bank and the customary practices of different supermarket retailers such as “taste the difference” and “Tesco’s Finest” (1987a). There is a distinction between the original examples and the reworked examples that Macneil does not draw in discrete and relational terms and that is the distinction between the atomized process of making the contract itself and the informational and network structure that surround it.

As Feinman explains (Feinman 2001:63) much of Macneil’s descriptive vocabulary is confusing and alien to the world in which one might expect it to have the most traction; contract lawyers. Terms such as “presentation”, “social matrix” and “solidarity” are not part of contract law’s terminological family when employed by a contract lawyer. This lexicon may sound more familiar to a scholar rooted in the disciplines of sociology or management perhaps. As a taxonomic collector of various objects I share Macneil’s admiration for classificatory structures but the presence of so many schemes and lists do nothing to elucidate his work. It perhaps explains the focus of his work on the social process of contracting to the exclusion of considering the relationships involved in social relations, the former being more susceptible to taxonomic structuring than the latter. To these problems we can add the reworking and refinements of terms that Macneil brought to his model all of which increase the opaqueness of his work. For example “relational” is

used interchangeably to contrast with “discrete” but also to refer more generally to contracts embedded in social relations. At one point (Macneil 1987a cf Feinman 1990) declared that exchange relations that were the opposite of discrete would be known as “intertwined”. However he later lost faith in this proposition (Macneil 1999-2000). These examples of the way in which Macneil constructed his edifice of contract behavior go to the heart of the confusion that surrounds Macneil’s message about the role he ascribes to discrete contracts in his worldview of contract.

The most common approach to the question of the discrete contract is to situate it at the opposite end of a spectrum to relational contract. Macneil hints at the existence of such a spectrum (Macneil 1974a: 737) and while it is not something that he develops (1987b: 277f) it remains part of his thinking if only as something which has purely mythical force (1999-2000: 894f). The most comprehensive and sophisticated discussion of this spectrum idea occurs in Campbell’s work (Campbell 1996:41-43; 2001:28-31; 2013: 178-182) and, as his analysis makes clear, what Macneil means by this idea of a discrete to relational spectrum is not a device for plotting contracts by type from spot to supply say or for mapping individual contract scenarios but a mechanism by which we can examine contract at a macro level. This is the only way that statements such as:-

Every contract involves relations apart from the exchange of goods itself. Thus every contract is necessarily partially a relational contract, that is, one involving relations other than a discrete exchange (Macneil 1980: 10)

can stand alongside the following:-

Discrete exchange will always be a comparatively rare phenomenon because it performs only the transfer of control function and is only minimally related to physical production of goods and services (Macneil 1985:488)

and not be seen as contradictions. In the first statement Macneil is talking about individual contracts and contract scenarios, in the second his focus is on economic ordering within society at a macro level. He is using the journey from discrete to relational to give a sociological account of how society evolves and then works (Scott 2013:114-115). His point is that both neo-classical economics and most expositions of contract doctrine that depend on the “will” theory as their underlying rationale are anchored incorrectly at the discrete end of the spectrum. They are represented by, or mirrored in, the discrete norm (Macneil 1983). If an economy was dependent on discrete contracts (a discrete economy, as Macneil describes it (1985:490)) as its primary method of facilitating exchange productivity would be very low and transaction costs would be very high. Contracts made via the internet using a site such as eBay have very low transaction costs (that is a significant part of their attraction) and so play back into the question of the descriptive force of the term “discrete”.

Macneil never intended that the label “discrete” should be appended to particular contract scenarios but rather that these interactions should be seen as more or less relational. This is clear from his use of marriage as an example of a relationship that can be more or less transactional depending presumably on the wishes of the parties involved and the nature of their relationship (Macneil 1987b). At the level of individual contract scenarios Macneil’s concern is with moving the legal analysis of exchange-based relationships beyond the idea of the simple regulated transaction towards identifying the norms that govern such transactions when they are viewed as continuing relationships between the parties. Macneil’s internal contract norms will determine how an exchange works in practice. The suggestion is that some norms will come to the fore when exchanges are more discrete, namely

‘implementation of planning’ and ‘effectuation of consent’;; while others, such as role integrity and solidarity, will be more evident in exchanges that are more relational. Factors that are present in the party’s relationship with each other but not included in the contract between them will become part of their obligation to each other. All ten of the norms that Macneil identifies will be present to some degree or another in each exchange. Of these ten norms, five hold special significance with Macneil’s scheme. These are *role integrity* and *propriety of means*, which come straight from the list of ten, and three others, which are a combination of the remaining eight. These three are *preservation of the relation* (an expansion of *contractual solidarity* and *flexibility*), *harmonization of relational conflict* (derived from *flexibility* and *harmonization of the social matrix*) and the *supra-contractual norm* (produced from the *harmonization of the social matrix*) (Macneil 1983; Spediel 1999-2000). These will be generated in the relationship over time.

Moving On

The difficulty with these five and the longer list of ten norms, or perhaps in the context of the discussion here, these indicators of “relationality”, is that they do not map onto what has become, at one and the same time, both a more atomized and individual society and a more networked, particularly in the technology sense of the word “networked”, society in terms of social and economic life than the one Macneil described and fitted his norms into. Macneil’s view of contract practice was that it was nestled in a society that was “Macaulay-esque” in structure. My reference here is to Macaulay’s classic article (Macaulay 1963) which described contractual practice in machinery manufacturing plants in Wisconsin in 1962. Macneil’s attachment to this

world is not surprising. It was the context that first confronted him when he began to set out his contract philosophy. Indeed one of the first articulations of his support for reliance-based norms reflecting the importance of conduct, trust and reliance between the parties as opposed to the expectation loss preference of formalist contract law occurs in the examination of a case concerning car manufacture in Memphis (Macneil 1962). The empirical work of others that he relied upon moving forwards to construct his norms from, obviously reflected the institutional framework of business practice in this period and similarly so did those empirical studies that might be taken to endorse Macneil's norm identification (Macaulay 1991; 2000).

The production landscape has changed however. The buying of widgets from a Wisconsin component manufacturer for a car construction plant in nearby Illinois no longer happens. Machinery manufacturing is unlikely to exist in Wisconsin now and in fact had probably ceased to exist by the early 1990s. A knowledge-based economy with nodal production sites has replaced large scale manufacturing in developed economies. The dismantling of nation state based trade and investment barriers have made it easier for industrial production to cluster into confined geographical areas that offer a combination of low regulation and low cost labour and access to natural resources. Core and periphery of production are no longer split between developed and industrialised states and non-industrial developing states (Dicken 2003:8-32). There are likely to be far fewer "local" deals enhanced by personal relationships giving rise to concerns about reputation and creating a sort of interdependence and shared code of conduct between the parties. Supply chains are global. The availability of IT creates more transparency around product price and quality, lessening the need to establish communicative ties with potential trading partners and to make long term

contracts as the transaction costs involved in changing and replacing contractual partners have become lower (Sturgeon, Humphrey and Gereffi 2011). Post-sales service and re-order information can be automated through IT use (Lancioni, Schau and Smith 2003; Chryssolouris, Makris, Xanthakis and Mourtzis 2004).

There are more contractual relationships rather than less in a world trading economy that is shaped in this way but they are different from the contract relationships that Macneil saw as typical. Webs of contracts exist around production but often to achieve particular goals that are not necessarily connected to the delivery and price of the end product. For example garment production and resource extraction often take place in low labour cost areas and inhospitable climates. Sub-contracts, supply chains and logistics firms have replaced vertical integration and, while Macneil did focus a great deal on horizontal arrangements, he did so with vertical integration and domestic level production rather than global production as the backdrop (Macneil 1975). Sub-contracts are the preferred method of relationship not least because the environmental and human rights risks associated with efficient (low cost) production can be insulated in the chain to avoid reputational damage to brand with investors and end consumers (Harpur 2008; Hoang and Jones 2012 cf Vandenberg 2007). Global production and the world economy are driven by retail consumption where the brand has triumphed and blurred boundaries between manufacturers and retailers and their supply chain (Petrovic and Hamilton 2011). Flexibility of production schedules, delivery dates and contract solidarity have little role to play here. Relationships of trust and interdependence are still important but they are more likely to be expressed as partnership arrangements and co-production arrangements around brand identity than relationships of contract *per se*.

This relocation of production and the subsequent financialization of developed economies has created service based employment with contracts of employment that are fixed term and temporary in nature now dominate in previously industrialized economic areas as employers try to hedge against the vagaries of product demand and the need for employees with contemporary skills. Or at least this is the perception of those who are contracting for employment (Tweedie 2013) and in the context of mapping “relationality” it is perception that is all-important as contract relationships are embedded in social relations, as those relations are experienced. It is not unusual for several part-time employment positions to be held at once in low-level employment with poor job satisfaction (Kalleberg 2011). Long-term employment

with a single provider has been replaced by portfolio careers. Workplace hierarchies are flatter and there is less room for norms that seek to preserve relationships or develop them beyond the limits of the printed conditions of employment (Marsden 2004). Macneil’s relational values are squeezed out of these highly planned arrangements of short and specified duration.

If we look at Macneil’s norms out-with private sector business relationships that are enforceable as legally binding contracts and in terms of more general exchange based relationships then the focus moves to the legacy of the New Public Management approach to governance of the early 1990s and the use of contract as the vehicle for delivering a range of state provided services and functions, including the construction and subsequent running of infrastructure facilities, often using private sector actors, to citizens. Macneil’s stress on underlying social relations allows us to see these structures as forming constitutional type relationships between citizen and state in which procedures for monitoring service provision, incentivising performance

and imposing administrative sanctions are laid out (Whitford 1985; Feinman 2000). Empirical work of the highest quality has been carried out on these relationships by Peter Vincent-Jones from the 1990s onwards (2000; 2006) looking at the use of compulsory competitive tendering in local government and considering the use of contract by the state to achieve certain policy goals, such as increasing citizen choice or modifying citizen behaviour, in areas as diverse as the conduct of school children in the form of home-school agreements on homework and the delivery of welfare services.

Vincent-Jones' conclusion is that measured against Macneil's norms these arrangements fall short of achieving legitimacy in terms of delivering on their policy objectives; there is insufficient possibility of adjustment that one might expect in an arrangement designed for both parties to achieve wealth-maximization, as the arrangements lack the inherent flexibility to adapt to changing circumstances. The norm of reciprocity, which underpins trust, is not present because often the resources on the state side of the contract are insufficient to address the needs of the citizen. In many of the relationships, but particularly those involving social control contracts, the norm of consent is missing. An alternative reading of Vincent-Jones' findings, though unpalatable in social policy terms, is that there was never any intention on behalf of the political and governance entities that use these arrangements that they should reflect the social norms that Macneil identifies as underpinning successful exchange relationships. The absence of this intention does not make these arrangements unsuccessful in terms of the more powerful party to the contract. While there have been periodic tweaks and recalibrations to the model there has not been a wholesale reconsideration of this methodology for service delivery by political entities nor has

there been revolution by citizens or ballot box rejection. What this shows instead is that it has been possible since Macneil first presented his model for contractual relationships, for these relationships, both in the legal and extra legal sense of contract, to exist with norms configured rather differently from the way in which they are explained by Macneil. The emerging picture is one that suggests that short-term arrangements of this type are no longer the epitome of the discrete transaction and but have evolved to exhibit similar relationality in terms of mutual regard to that found in more long-term arrangements (Davis 2007). In order to make these relationships sufficiently stable for public service delivery, both public sector and private sector actors have become learning organizations. Their learning trajectories are different and are related to evolving political imperatives and local context (Hartmann, Davies and Frederiksen 2010).

III-Contracting on eBay

Macneil's model of contracting behavior and his explanations for it have become disrupted. What have traditionally been flexible settings have become less flexible, short term exchange relationships have become ones in which there is mutual regard between the parties while some long term relationships do not exhibit this. What might have been a signifier for a discrete contract might now describe the relational setting of a more embedded contract. The persistence of brand, for example, might point us to look at a series of contracts as a unified process rather as differently constituted unique relationships with their own constructions of solidarity and flexibility. Macneil's norms can be re-arranged to map onto what in some cases are

new kinds of relationships and in others are familiar relationships that differently structured. What is not lost in this rearrangement is the importance of social relations.

In the same way that Macneil sought to “relationalise” his archetypal discrete contract, the purchase at the turnpike gasoline station contract, by describing the credit relations that accounted for the gas purchase on the turnpike and the supply of gas to the station and by referring to the advertising of the gas brand and indeed the presence of the gas station itself at that particular location on the turnpike, we can “relationalise” an eBay transaction. A number of charities use eBay to sell off potentially collectable items that have been donated for sale at their shops and collection points. Courses are offered through colleges and independently for those who want to become successful eBay entrepreneurs, several “how to” guides have been published on eBay selling and a number of satellite business have developed, such as the *iSold it* drop off stores, selling goods on commission for others on eBay. However, while for the gas station example placing the transaction in a sea of other business relationships is the only way to make it more significant than a brief encounter by the side of a turnpike, this reading of eBay transactions misses the very much more real and personal social relations that surround each individual transaction in the form of the eBay feedback system.

eBay is not involved in the delivery of goods or the sale of goods as a trading entity. It does not see or inspect items that are being offered for sale or extend its reputation to warranting them or authenticating them in any way. It is an electronic platform charging sellers to list their items and taking a percentage of an item’s sale price, similar to a large electronic car boot sale site or newspaper advertisement column, that acts as an intermediary to allow sellers and buyers to match their desires

for gain by taking part in either an auction or an immediate sale and purchase through online person to person trading (Mishra 2010). However instead of scanning lists of newspaper advertisements or rummaging through a dusty car boot while being jostled by other potential buyers, object location on eBay is as the result of a tailored search. The seller describes the item offered, often with photographs, posts an end date, a minimum starting bid and a bid increment. While business listings occur on eBay the majority of its sales in the collectables market are consumer-to-consumer transactions (Flanagin 2007).

To be successful as an electronic platform eBay has to be able to accomplish two things at the level of technical design. It needs to be able to manage a diverse group of buyers and sellers in terms of having recognizable brand identity within which there is sufficient flexibility to accommodate a variety of interests that underlie participation ie eBay must be able to attract sufficient buyers for sellers to think that listing fees for items they are selling are worth paying and it needs to be able to offer reassurance that the risk involved in a one-time exchange and possibly more (although there is evidence that the vast majority of exchanges that take place on eBay are between buyers and sellers that do not deal with each other again (Resnick and Zeckhauser 2002) of money for an object that cannot be seen, except in a photograph, or touched, is as low as possible. As eBay is an intermediary that means that risk must be calculable and manageable by the users. The eBay system requires buyers to pay for their purchases before sellers dispatch them. Consequently it is upon buyers that the risks of moral hazard (in the form of post contractual opportunism such as non-dispatch of the item despite receiving payment) and information asymmetry (adverse selection due to unannounced defects) fall (Dewan and Hsu

2004).

If we return to the earlier example of eBay being employed to source and purchase Beswick Beatrix Potter character figures then at any one time there are approximately 2500 figures on eBay that fall within the descriptive parameters of “Beswick Beatrix Potter” figures ranging in starting price bids from £5 to £3999. Some very rare figures may be listed only once in those 2500 listings, other less rare figures may appear 50 times or so listed by different sellers. The question for a buyer is how they choose their seller in a market where there is a choice and in a market where there is only one seller how they decide whether to trust them or not by making a purchase. Engaging in exchange relations on eBay is not about the market reputation of a particular item but much more about a buyer’s trust in the seller of the product to describe that product accurately and dispatch after receiving payment. In the context of Beatrix Potter figures what matters to the collector is that the figure is not restored but is in its original condition. A perfect figure is worth more than a damaged figure but a damaged figure is worth considerably more than a restored figure. Damage can often be seen in photographs but restoration can only be detected by physical inspection. Also of importance is the stamp that appears on the underside of the figure, “the back stamp”. This determines the age of the figure as some thirteen different variations of back stamp were used in the fifty or so years that these figures were produced (Baynton, May and Morton 1986). It is not the case that older figures are always worth more than newer figures. Some figures were only made with a particular back stamp for a very short time and so are valuable for reasons of rarity rather than age. In the absence of a photograph, as a collector I am reliant on the description that the seller gives of the back stamp. An unscrupulous seller can provide

false information or feign not to understand the significance of the detail they are being asked to provide and so provide no information or wrong information (Robinson and Halle 2002). In some cases the value of a particular figure depends on very small design details that evolved over the years of production and distinguish one version of the figure from another. Beswick secured copyright permission to design and produce the Beatrix Potter figures in 1948. The modeller, one Arthur Gredington, sometimes changed the shape of a figure slightly or the colour of particular parts of the figures within the same back stamp. For example there are three versions of the Benjamin Bunny figure, all within the same back stamp, that have vastly different values not least because one of them was only produced for two years (Callow and Chorley 2008). Space does not permit me to explain in detail the stylistic differences between these figures but suffice to say I am reliant on the angle that the seller's photograph is taken from to know for certain whether Benjamin's ears protrude beyond his hat or not, in other instances I am reliant on the quality of the seller's camera to reproduce accurately the colour of his jacket. I have to *trust* the seller if I am to purchase the figure. If I cannot trust them I potentially miss an opportunity.

None of the usual social cues that generate trust and confidence or wariness and mistrust in a face-to-face interaction are present. Nor, given the prevalence of single buyer-seller exchanges can trust in the seller be established through repeated interactions. Presentation, in Macneil's terms, reigns and so there is no interest from the seller in securing co-operation from the buyer in relation to establishing a relationship that will be both productive and negotiable into the future. As a platform eBay offers users, and this primarily means buyers, as sellers are free to offer their

item for sale again if payment does not materialize, an opportunity to choose their seller using the experiences of others as a trust barometer. It does this through offering a feedback forum. In using this forum buyers are invited to describe in one word, taken from a pre-selected menu, their view of the quality of experience that the transaction provided; positive, negative or neutral. Sellers can only leave positive feedback for buyers or no feedback at all. This reflects their more immediate power in individual transactions. The buyer can justify their view in 80 characters and then rate, using a starring system, aspects of the transaction such as the accuracy of the item description, the speed of dispatch and the postage costs. As the seller engages in more sales so a reputation is built up online and can be accessed by a potential buyer who can then, using the information in the profile, decide on the likely honesty and trustworthiness of a buyer. Buyers' power then is reflected backwards through transactions. The feedback system is being used to generate trust through a formalized process in which a buyer, unsure whether to trust a seller not known to them, is encouraged to establish trust in that buyer based on the views of other eBay users that are also unknown to them. It is a reputational gossip network where an individual buyer is substituting personal knowledge of a seller or a personal recommendation from someone they know who has dealt with the seller for a much larger volume of recommendations from strangers (Resnick, Zeckhauser, Friedman and Kuwabara

2000; Van Swol 2006). In addition to attracting fewer potential buyers, sellers with persistently low scores feedback scores might find that they are suspended by eBay or restricted in what they can sell by eBay. What emerges from the feedback system is a reputation management methodology whereby both sanction power and signaling power can be exercised by buyers to deal with moral hazard and adverse selection

respectively (Dellarocas 2003).

Reputation created and managed in this way is different to the social relations that surround reputation when single transactions are carried out offline. Online interactions involve leaving negative feedback where the individual who is its object, unlike the conveying of negative reputational information to third parties that occurs offline, can see it; an aggrieved buyer may not want this degree of direct exposure to seller even in circumstances where the identity they are presenting is their eBay identity rather than their offline identity. In the absence of the intention to trade in the future with the particular seller there is no incentive to leave feedback of any sort as the beneficiaries of that feedback will be unknown future traders although, in fact, it seems that feedback is left in around 60% of transactions (Saeedi, Shen and Sundaresan 2012). There is the possibility of feedback being gamed through the use of seller collaboration to increase positive scores or high positive feedback scores being sprung from a vast number of low price trades to create a misleading picture of reliability when a high price trade is attempted. It is straightforward for a seller to create an entirely new identity which, while it is not enhanced by positive feedback, has not been sullied by negative feedback either. Notwithstanding these concerns about its absolute accuracy and reliability the eBay feedback system is clearly considered by the users of eBay to be robust enough to allay their concerns about seller honesty and reliability. Not only is eBay itself an extremely successful business but also analysis of transactions suggests that sellers with higher feedback ratings achieve higher prices for their listings (Ottaway, Bruneau and Evans 2003).

Feedback on eBay has the effect of creating social relations between strangers. In this respect it is different from other online presences such as retail stores where

the object is to create trust in the technology itself rather than a person (Shanker, Urban and Sultan 2002). Feedback provides information from one buyer to millions of potential buyer another about a seller they may never encounter very quickly and it overcomes the geographical dispersal of buyers. It provides a rich and documented form of support that achieves more granularity than offline reputational discussions are likely to do (Tambyah 1996) . The feedback system is successful in creating relationships of trust because it pulls on the levers of community responsibility and individual participation. It is a tool that empowers individuals to punish or reward a trading partner knowing that others will operate a sanction based on their view and there is an obligation on individuals to participate by leaving feedback if the system is to appear reliable (Heimer 2001) to the user community. The idea of relying on feedback appeals to the current climate of trust which appears to be placed more strongly by individuals in “people just like ourselves” than in other groups such as political or business leaders (Eldeman Trust Barometer 2012, Tett 2013). The feedback system allows individuals to decide whom they will trust while wrapping their decisions into the fold of community values that they as buyers share are encouraged to adopt. EBay supports and encourages the idea that buyers are an online community (Mathwick 2002) with shared values - in its statement of “community values” eBay asserts, “people are basically good” and extorts users to “treat others the way that you want to be treated”.

IV Conclusion

In this contribution I have set out the case for the continuing utility of Macneil’s relational contract theory despite the changing context of contracting behavior in a

world that is very different from the one described by Macneil. Advances in technology and changing economic patterns that impact on how contracts are made and how contracts are experienced need to us to reconsider the indicators that we use for Macneil's conceptual categories of *relational* and *discrete*. These different contexts allow us to make a more relational assessment of situations that would appear on first sight to be much closer to a discrete situation. EBay trading contracts rely on community constructed feedback to counter information asymmetry. As online shopping and trading increases in popularity we may come to see social relations constructed to radiate beyond the contracting partners as the paradigm example of 21st century contract relations in the same way that machinery supply in Wisconsin was the paradigm contract of the second half of the 20 century for those of us, who, following Macneil, have rejected the doctrinal model of the purely discrete exchange.

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